COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-949

SALLY ANN CORMIER[1]

vs.

RONALD KONING, JR.,[2] & another.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Sally Ann Cormier (Sally) appeals from a judgment entered by a judge of the Probate and Family Court dismissing her complaint in equity and denying her requests to remove the trustees, for injunctive relief, and for declaratory judgment. She argues on appeal that the judge erred in (1) failing to find Ronald Koning, Jr. (Ronald, Jr.) and Jon Koning (Jon)[4] in breach of their fiduciary duties as trustees of the Koning Family

[1] Prior to trial, plaintiff Jennifer Hine settled her claims against the defendants; she is not a party to this appeal.

[2] Individually and as cotrustee of the Koning Family Irrevocable Business Trust, and as trustee of the Ronald Koning Sr. Life Insurance Trust.

[3] Jon Koning, individually and as cotrustee of the Koning Family Irrevocable Business Trust.

[4] We refer to the family members by their first names for ease of reference. We sometimes refer to Ronald, Jr. and Jon collectively as the trustees.

Irrevocable Business Trust (trust), or in violation of G. L. c. 203E, § 814, when they distributed to themselves the entire principal of the trust; (2) considering and relying on Ronald Koning, Sr.'s (Ronald, Sr.) trial testimony to explain his intentions in creating the trust; and (3) finding that Ronald, Jr. and Jon acted independently and in good faith, rather than under an agreement of collusion, when they distributed to themselves the company stock held by the trust. For the reasons that follow, we affirm.

Background. State Electric Company (company) is a family business established by Ronald, Sr. in 1988 as an S-corporation.[5] After his wife's death, Ronald, Sr. held one hundred percent (2,000 shares) of the voting shares of the company. During the time relevant here, Ronald, Jr. held the position of president of the company, and Jon was the vice president; Sally worked at the company for a short period of time between 1996 and 1998, and then again between 2000 and 2004, before she relocated to Arizona where she worked as a real estate agent.

In 2006, for the purpose of asset protection and estate and tax planning, Ronald, Sr. created two irrevocable trusts. On March 10, 2006, the Ronald Koning, Sr. Life Insurance Trust

[5] Ronald, Sr. and Sandra Koning have four adult children: Ronald, Jr., Jon, Sally Ann Cormier, and Jennifer Hine.

(life insurance trust) was established.[6] Ronald, Jr. was appointed, and has remained since inception, the trustee of the life insurance trust; Jon was designated as the successor trustee. On June 30, 2006, Ronald, Sr. established the trust;[7] Ronald, Jr. and Jon were appointed as cotrustees, and, according to Ronald, Jr., Lou Sannella was informally appointed as the trust protector.[8] The beneficiaries of the trust during Ronald, Sr.'s lifetime consisted of "members living at the time of payment, of a class consisting of [Ronald, Sr.]'s issue of all generations"; the parties agreed that the class of beneficiaries

---

[6] The life insurance trust was funded by a life insurance policy with a payout benefit upon Ronald, Sr.'s death; the annual premium for the policy was paid each year from the trust. Neither income nor principal was ever paid out from the life insurance trust. Sally makes no challenge on appeal to the handling of the life insurance trust.

[7] The trust was established as an "Intentionally Defective Grantor Trust," in accordance with Internal Revenue Code § 675(4)(C), for the purpose of removing company assets from Ronald, Sr.'s estate and to reduce his tax liabilities. As settlor of the trust, Ronald, Sr. was responsible for the payment of annual income taxes due on the profits generated by the company and attributed to (or passed through) the trust. By June 2007, the trust held all of the company's voting and nonvoting stock; in exchange for stock gifted or sold to the trust by Ronald, Sr., he received two separate life annuities paid out of the trust. Sally's expert witness agreed that the establishment of the trust and the life insurance trust was an effective estate planning technique to reduce or eliminate estate taxes.

[8] Under article 15, the trustees were allowed to appoint a trust protector for the purpose of making distributions from the trust to pay the Federal and State tax liabilities in accordance with article 31 of the trust.

included Ronald, Sr.'s four children, and four grandchildren. Upon his death, the intended beneficiaries of the trust were Ronald, Jr., Jon, Sally, and Jennifer.[9]

On June 15, 2009, after a vote of the company's board of directors to waive restrictions on the transfer of stock and to issue stock certificates,[10] the trustees distributed the entire 2,000 shares of voting stock out of the trust. Ronald, Jr. and Jon, as beneficiaries of the trust, each received 1,000 shares of the company's voting stock, which they deposited in their own personal family trusts. In January 2014 (and June 2014) the company's board of directors again voted, this time waiving restrictions on the transfer of the company's 18,000 shares of nonvoting stock from the trust. As a result, 9,000 nonvoting shares of the company were distributed from the trust to Ronald, Jr. and Jon, respectively. The eventual removal of all of the company stock from the trust resulted in the elimination of Ronald, Sr.'s income tax burden.

Discussion. 1. Distribution of company stock from the trust. a. Breach of fiduciary duty. Sally claims that the trustees breached their fiduciary duties by making reciprocal

[9] If any of Ronald, Sr.'s children predeceased him, their share of the trust would pass to that beneficiary's living issue.

[10] It appears from the record on appeal that Ronald, Sr., Ronald, Jr., and Jon comprised the company's board of directors.

distributions to each other, failing to consider Sally's beneficial interest in the trust. The judge concluded that articles 2.01, 7.01, and 7.02 permitted Ronald, Jr. (as trustee) to transfer to Jon (as a trust beneficiary) a certain number of shares of the company's stock held by the trust and that the transfer by Jon (as trustee) to Ronald, Jr. (as a trust beneficiary) was likewise permitted.

We review the judge's determination de novo. See Ferri v. Powell-Ferri, 476 Mass. 651, 654 (2017) (interpretation of written trust is matter of law). "Under the Massachusetts Uniform Trust Code (code), a trustee has a duty to 'administer the trust as a prudent person would, considering the purposes, terms and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.' G. L. c. 203E, § 804. A trustee must at all times 'administer the trust solely in the interests of the beneficiaries.' [G. L. c. 203E,] § 802 [(a)]." Passero v. Fitzsimmons, 92 Mass. App. Ct. 76, 79-80 (2017). "[T]he trustee shall exercise [such] a discretionary power in good faith." G. L. c. 203E, § 814 (a).

Article 2.01 of the trust gave the trustees the discretion, during Ronald, Sr.'s life, to "at any time or times and for any reason, pay any part or all of the income and principal of the trust to or for the benefit of any one or more (or all) of" the

beneficiaries living at the time of payment. The provisions of article 2.01 did not limit the trustees' discretionary powers by requiring them first to consider an ascertainable standard before making a principal distribution from the trust; nor were they bound by any obligation to consider the financial status of any beneficiary.[11] In the absence of such language, the trustees were afforded the broad discretion to distribute trust principal to any individual trust beneficiary, including each other, for any reason within the bounds of their fiduciary duties. See Harootian v. Douvadjian, 80 Mass. App. Ct. 565, 569 (2011) (trust language did not require trustee-beneficiary to "use her own assets before invading the trust principal to pay for her support").

In addition, article 7.02[12] of the trust specifically authorized a distribution by one trustee to another trustee as a trust beneficiary. It has "been long recognized that the terms

---

[11] Article 7.01 provided:

> "In making discretionary distributions, the [t]rustee may consider other resources available to a [b]eneficiary, but may make such distributions even though there are other resources available except as otherwise provided herein."

[12] Article 7.02 provided that

> "[w]henever income or principal is payable in the discretion of the [t]rustee, to or for the benefit of a [t]rustee, or such [t]rustee's issue, without an ascertainable standard, such discretion shall be exercisable solely by the other [t]rustee or [t]rustees."

of [a] trust document may grant the trustee such extensive discretion, beyond that ordinarily inhering in a trustee as matter of law, as to authorize the performance of acts which would otherwise be invalid as violative of the trustee's normal duties." Steele v. Kelley, 46 Mass. App. Ct. 712, 734 (1999). It is clear that in drafting the trust, Ronald, Sr. anticipated the conundrum presented by Ronald, Jr. and Jon acting as trustees while simultaneously benefiting from the trust. Thus, he included language in article 7.02 that provided Ronald, Jr. the discretionary powers necessary to distribute principal to Jon, as a beneficiary, and for Jon to distribute principal to Ronald, Jr., as a beneficiary, while still maintaining a duty of loyalty to the trust and the other beneficiaries. See id. See also Boston Safe Deposit & Trust Co. v. Lewis, 317 Mass. 137, 141 (1944) ("where the method selected by a [settlor] for the accomplishment of the purpose and object of the trust cannot be adopted by a trustee without dealing with himself individually, it may be fairly assumed that such dealing was contemplated by the [settlor]").

Consequently, the distributions of the company stock from the trust to Ronald, Jr. and Jon, as beneficiaries, were not transactions that put the trustees in a position of conflict with the interests of the trust, as these transactions constituted allowable distributions to two of the four trust

beneficiaries in accordance with the language of the trust instrument. The transactions did not involve either Ronald, Jr. or Jon's purchasing property from, or selling property to, the trust solely to benefit themselves -- self-dealing acts strictly prohibited. Nor did the transactions involve the trustees borrowing money from, or lending money to, the trust or exchanging property with the trust -- acts also prohibited. See Restatement (Third) of Trusts § 78(2) and comment d (2007). In this case, the distributions to beneficiaries Ronald, Jr. and Jon were not acts of self-dealing, but rather actions permitted by specific language contained in the trust instrument to accomplish the intended purpose of the trust in alleviating Ronald, Sr.'s tax liability while maintaining Ronald, Jr.'s and Jon's ability to successfully run the company. Contrast Johnson v. Witkowski, 30 Mass. App. Ct. 697, 709 (1991) (corporate directors and trustees breached fiduciary duties by "plac[ing] their own interests ahead of the interests of the trust and the corporation").

Furthermore, expert testimony, which the judge credited, supported the reasoning behind the trustees' distribution of the company stock out of the trust in order to rectify the unintended tax consequences imposed on Ronald, Sr.; a necessary maneuver to maintain the purpose of the trust. "In this fact-intensive case, [the judge] was in the best position to assess

the credibility of the witnesses and to determine the facts." Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 636-637 (2010). "[T]he 'judge's assessment of the weight of the evidence and the credibility of the witnesses is entitled to deference.'" Adoption of Rhona, 57 Mass. App. Ct. 479, 482 (2003), quoting Petition of the Dept. of Social Servs. to Dispense with Consent to Adoption, 397 Mass. 659, 670 (1986).

The judge also concluded that the trustees' independent actions in distributing the company's stock were in accordance with Ronald, Sr.'s intentions as memorialized in the language of the trust, and not adverse to Sally's interests as a beneficiary. We discern no clear error in this ruling. See Woodward Sch. for Girls, Inc. v. Quincy, 469 Mass. 151, 159 (2014) (reviewing for clear error judge's finding that trustee breached fiduciary duty). Sally failed to meet her burden to show otherwise.[13] See Millennium Equity Holdings, LLC, 456 Mass. at 637, quoting Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997) ("It is the appellant's burden to show that a finding of fact is clearly erroneous"). Based on the

[13] Sally's "Issue 3" argument that the judge erred in determining that the trustees made independent decisions to make distributions lacks support in the record and, in any event, we have concluded that these decisions did not violate G. L. c. 203E, § 814. See discussion, infra.

foregoing, we agree that neither Ronald, Jr. nor Jon breached his respective fiduciary duty as a trustee of the trust.

b. Violation of G. L. c. 203E, § 814. Similarly, the trustees did not violate G. L. c. 203E, § 814, the "discretionary powers" and "tax savings" provision of the code. There was sufficient evidence from which the judge could conclude that the trustees acted in good faith when they distributed the company stock out of the trust. See G. L. c. 203E, § 801. We find no merit in Sally's argument that because the trust did not contain explicit language overriding § 814 (b), the trustees were prohibited from making the distribution of the stock to themselves. See G. L. c. 203E, § 814 (b). The establishment of the trust in June 2006 predated by more than six years the enactment of the code. See G. L. c. 203E, §§ 101 et seq., inserted by St. 2012, c. 140, § 56. As a result, it stands to reason that the trust would not contain the language Sally argues is required; thus, we need not reinterpret the terms of the trust to comply with the later-enacted statutory language. See Bongaards v. Millen, 440 Mass. 10, 30 (2003) ("the mere fact that a new Restatement has been issued does not, and should not, cause [the court] to reinterpret a statutory term that long predates the promulgation of either Restatement"). "It is fundamental that a trust instrument must be construed to give effect to the intention of

the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution (emphasis added)." Ferri, 476 Mass. at 654, quoting Watson v. Baker, 444 Mass. 487, 491 (2005).

Distribution of the company stock to Ronald, Jr. and Jon was not a decision that, according to the trust language, needed approval from the beneficiaries. See Morse v. Kraft, 466 Mass. 92, 98 (2013) (terms of irrevocable trust allowed trustee to transfer trust property to new subtrust "without the consent of the beneficiaries or a court"). Additionally, although the trustees did not provide the beneficiaries with regular accountings of the trust, there was no evidence at trial indicating that the trustees were in any way hiding the distributions from the other beneficiaries. There was, however, evidence that the trustees prudently considered Ronald, Sr.'s stated intention to provide financially for Sally in his will in lieu of her benefiting from the trust before they "exercis[ed] reasonable care" in carrying out the purpose of the trust. G. L. c. 203E, § 804. See Passero, 92 Mass. App. Ct. at 80. There was ample evidence to support the judge's finding that Ronald, Jr. and Jon acted in good faith when each distributed a portion of the company stock to the other as a trust

beneficiary.[14] See Johnson, 30 Mass. App. Ct. at 706 ("The burden of proving good faith and fairness is on the trustee").

2. Ronald, Sr.'s testimony. Sally argues that because there was no ambiguity in the language of the trust, it was improper for the judge to consider the extrinsic testimony of Ronald, Sr. "In interpreting a trust, the intent of the settlor is paramount." Morse, 466 Mass. at 98. "[W]e do not read words in isolation and out of context. Rather we strive to discern the settlor's intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed." Hillman v. Hillman, 433 Mass. 590, 593 (2001).

In this case, Ronald, Jr. and Jon testified that the purpose of distributing the company stock out of the trust was to keep in line with their understanding of the purpose for the trust -- to keep company assets out of Ronald, Sr.'s estate and to reduce his income tax liability. With the benefit of Ronald, Sr.'s testimony as to the circumstances surrounding his establishment of the trust, the judge permissibly corroborated her interpretation of the language of the trust and the actions

[14] Based on this same rationale, we discern no error in the judge's finding that Ronald, Jr. and Jon acted independently when they each decided to distribute to the other nonvoting shares of the company. See Adoption of Rhona, 57 Mass. App. Ct. at 482.

taken by the trustees. In doing so, the judge "construed [the language of the trust] to give effect to the intention of [Ronald, Sr.] as ascertained from the language of the whole instrument considered in the light of circumstances known to [him] at the time of its execution." Ferri, 476 Mass. at 654. See Freedman v. Freedman, 445 Mass. 1009, 1010 (2005) (judge heard input from settlor as to her intent in establishing grantor retained annuity trusts for purpose of transferring family business to her sons with minimum of Federal estate tax consequences). The judge did not err in hearing Ronald, Sr.'s testimony, as it was not used to "contradict or change the written terms," or to create an ambiguity in the plain language of the trust instrument. See General Convention of the New Jerusalem in the United States of Am., Inc. v. MacKenzie, 449 Mass. 832, 835-836 (2007). See also id. at 835 (parol evidence will not be admitted to create ambiguity where plain language of contract is unambiguous).

Ronald, Sr. testified at trial that the purpose of creating the trust, among other things, was to alleviate complicated tax liabilities attributed to him from profits generated by the company; Ronald, Jr. and Jon were designated the trustees of the trust because they were licensed electricians, worked in the industry, and would be responsible for the operation of the company upon Ronald, Sr.'s retirement. In addition, the

evidence demonstrated that Ronald, Sr. had intended for Ronald, Jr. and Jon ultimately to own all of the company stock, as together they ran the company and had taken great personal and financial risk in growing it to its current success.

Contrary to Sally's argument, Ronald, Sr. did not "change[] his mind" with regard to the purpose of the trust; the transfer of the company stock out of the trust was done to rectify the mounting unintended tax consequences to Ronald, Sr. created by the trust. See Hillman, 433 Mass. at 593. Notably, there was no evidence showing, as Sally suggests, that the purpose of the trust was to provide annual monetary distributions to Sally and her siblings until their father's death. We see no error, and certainly no abuse of discretion, in the judge's allowing Ronald, Sr.'s trial testimony.

Judgment affirmed.

By the Court (Kinder, Singh & McDonough, JJ.[15]),

Joseph F. Stanton

Clerk

Entered: June 21, 2019.

[15] The panelists are listed in order of seniority.